Number 219.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1923.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT,

v.

W. H. OSBORNE, JR., AS TAX COMMISSIONER OF THE STATE OF NEBRASKA, GILBERT E. HAASE, AS COUNTY TREASURER, BUFFALO COUNTY, NEBRASKA, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR DISTRICT OF NEBRASKA.

SUPPLEMENTAL BRIEF OF APPELLEES.

C. S. SPILLMAN, Attorney General of Nebraska,
GEO. W. AYRES, Asst. Atty. Gen'l of Nebraska,
HUGH LAMASTER, Asst. Atty. Gen'l of Nebraska,
Solicitors for Appellees.

WOODRUFF-DEINEMAN CO., Law Briefs, Lincoln, Neb.

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Solicitors for Appellees.

Since the filing of appellees' brief appellant has filed a new and enlarged brief in substitution of its former brief. The new brief contains additional matter requiring answer.

1. COMMENTS ON THE EVIDENCE.

Appellant refers to the evidence as though unquestionably sustaining its position (Brief 7, 20). The contrary is true. A few facts will show that there was no overvaluation: In 1912, in a physical valuation proceeding before the Nebraska state railway commission, appellant offered evidence showing that on July 1, 1909, its Nebraska properties had a reproduction new value of upwards of $200,000,000 (Tr. 158 and Exhibit 35). Extensions, additions and betterments, under evidence offered by appellant, since July 1, 1913, amount to nearly $18,000,000 (Tr. 100). Also, the appellant raised no question before the board of equalization and assessment as to the valuation of its own properties (Tr. 104-106). Its only complaint was that other property was under-assessed. Upon that issue the evidence is more favorable to the appellees

All property in Nebraska is assessed at less than actual value. The evidence shows that appellant's property is not assessed more in proportion to its value than is other property assessed in proportion to its value.

2. THE LAW PROVIDING FOR A REVIEW IN THE SUPREME COURT OF THE STATE DOES NOT ATTEMPT TO DEPRIVE THE FEDERAL COURT OF JURISDICTION.

The appellant repeatedly referred to the fact that no state statute can oust the Federal court of jurisdiction and many cases are cited in support of the proposition. All such discussion is outside the present case. There is no claim on the part of appellees that a state statute can, in any case, oust a Federal court of its jurisdiction.

The principles of equity, as administered by the Federal courts, will not permit their jurisdiction to be exercised where the taxes of a state are involved and the laws of such state afford an adequate remedy to correct illegal assess-

ments either before administrative tribunals, or before the courts. Nebraska laws provide an ample remedy. Therefore, the federal courts on principles of equity will not take jurisdiction. Thus, matters in taxation appear to be a distinct exception to the general rule, but, in fact, they are not an exception. In an ordinary case there must be adequate legal remedy offered by the Federal law in order to prevent the jurisdiction of the Federal courts from attaching. In taxation matters the courts refuse to take jurisdiction until the remedies offered by the laws of the state have been exhausted. The reasons for this are obvious.

Taxes are not obligations until duly levied on proper assessments. As long as there remains anything which the state may do before the assessment becomes final, there is no ground for equitable interference. In this case, if the appellant had invoked the power of the Supreme Court of Nebraska by an error proceeding and had secured the setting aside of the board's order, there would have been no assessment. The board would have had to reassess the property before there could have been a final assessment. Appellant seems to confuse the term "final order," as used in Section 9128, Statutes of Nebraska for 1922 (p. 21, first brief of appellees), with an order that is not subject to any further action. A "final order" is an order affecting a substantial right and determinative of action. The term is used in contradistinction to an interlocutory order which may not be made the basis of a review. In fact, when the final order is entered authority to review it originates.

3. THE REMEDY OFFERED BY THE STATE FOR THE CORRECTION OF ERRORS OF ITS OFFICERS IN THE ASSESSMENT OF PROPERTY MAY BE EITHER ADMINISTRATIVE OR JUDICIAL.

The Nebraska railroads are assessed (except where assessed locally) by the state board of equalization and assessment. Its decisions are reviewable upon error by the supreme court,

which may set aside the order of the board if it is not in harmony with law. If the order be set aside the proceeding is remanded and a hearing *de novo* before the board takes place. Thus, the assessment may not be complete until the supreme court has decided and the board has again acted. Until there is a valid assessment there can be no tax; therefore, there can be no lien and, of course, no cloud on title, no multiplicity of suits, and no injury of any kind.

It is clear from the cases that the remedy may be either administrative or judicial.

Shelton v. *Platt*, 139 U. S. 591.

Indiana Mfg. Co. v. *Kochne*, 188 U. S. 681.

Singer Sewing Machine Co. v. *Benedict*, 229 U. S. 481.

Keokuk & Hamilton Bridge Co. v. *Salm*, 258 U. S. 122.

4. THE REMEDY PROVIDED BY STATUTE IS PLAIN.

Appellant directs many criticisms against the statute as affording only a doubtful remedy. It is said in its brief (p. 34):

> "Under a strict construction of the statute there was ground for claiming that the railroad assessment was not before the state board at the equalization meeting. Also, Section 5901 authorizes the state board to equalize 'between counties' and 'between classes and kinds of property in any county.' This provision of the statute gave further basis for the argument that railroad property was not before the state board for equalization purposes. In *Hacker* v. *Howe*, 72 Neb. 385, 101 N. W. 255, the supreme court held that the state board did not deal with assessments of individual property owners and the statute seems to contemplate only an equalization between counties and between various classes of property within any county or tax district."

There appears to be no reason for a strict construction. The legislation is remedial and should be construed liberally

in order to effectuate its purpose. The appellant, in filing its objections before the state board of equalization and assessment, treated the statute as giving the board power over railroad assessments; the board received the objections and treated them as though railroad property was before it. The entire proceeding before the board, as shown by the record in this case, indicates that there was no doubt; all parties were clear that the board had power to consider railroad property. Nothing has come to pass since that time to throw doubt upon the statute.

Hacker v. *Howe*, *supra*, referred to the statute as it then existed, section 130, article I, chapter 77, Compiled Statutes for 1903, which read as follows:

> "The state board of equalization and assessment shall, on the third Monday of July of each year, meet at the state capitol for the purpose of equalizing assessments. They shall proceed to examine the abstracts of property assessed for taxation in the several counties of the state, including railroads entirely within such county, and all other property, and shall equalize such assessments so as to make the same conform to law, and for that purpose they shall have the power to increase or decrease the assessed valuation of any county, and such increase or decrease shall be made by a per centum, and the per cent of increase or decrease when made shall be certified to the county clerk of the proper county, who shall thereupon add to or deduct from the assessment of each piece or parcel of property in the county affected, an amount equal to the per cent of increase or decrease fixed by the state board.

There was then no provision as to equalization of classes of property. Now the board not only has all property before it, but it also has power "to increase or decrease the assessed valuation of any class, classes or kinds of property in any county or tax district, whenever in their judgment it shall be necessary to make such assessment conform to law" (Section 5901, Statutes of Nebraska; appellee's former brief, page 10).

Appellant further says (Brief, 35-36):

> "The statute does not provide that railroads, or other individual taxpayers, shall be notified or permitted to appear, present evidence, preserve exceptions or prosecute error. The equalization by the state board is not of a private, but of a public character. The words 'any person, county or municipality affected thereby' may mean the county clerks, county assessors, members of the county boards, counties and municipalities, as they are the individuals and governmental subdivisions notified and authorized to appear before the board."

As the statute fixes the time of meeting notice is unnecessary:

State R. R. Tax Cases, 92 U. S. 575.
Kentucky R. R. Tax Cases, 115 U. S. 321
Pittsburgh, etc., Ry. Co. v. *Backus*, 154 U. S. 421.

The general presumption prevails that there is a right to appear and be heard.

Kentucky R. R. Tax Cases, supra.

The Constitution of Nebraska, Article I, Section 24, preserves the right to be heard in all civil cases in the court of last resort. The statute provides that upon application the board shall furnish a certified transcript of its proceedings (Section 5901; appellee's first brief, page 10). It further privides (Section 9131; appellee's first brief, page 21) for the filing of such a transcript. Section 8823, Comp. Stat. 1922, is, in part, as follows:

> "Provided, any person or officer, or the presiding officer of any board or tribunal before whom any proceeding may be had, shall, on request of any party thereto, settle, sign, and allow a bill of exceptions of all the evidence offered or given on the hearing of such proceeding."

These provisions insure the taxpayer the right to appear, be heard, offer evidence, preserve the same in a bill of

exceptions, secure a transcript and have the matter reviewed in the supreme court.

We have the administrative construction to the effect that the taxpayer has the right to the fullest hearing. In addition there is the construction placed upon the statutes by the parties to this proceeding to the same effect and the salient fact that the appellant had a full hearing before the board (Tran. 104-142).

See also—

Chicago, B. & Q. R. R. v. *Babcock*, 204 U. S. 585.

There is not even a possibility of construing the term "any person" as appellant attempts to construe it. The term "any person" is broad enough to comprehend everyone. General words must be limited to the objects to which the legislature intended to apply them. It is clear that the legislature expressly limited them to persons "affected thereby" and as the legislature has expressed limitations no others can be applied. It is suggested that "any person" may refer to county clerks, county assessors, or members of county boards. As such persons could only appear for counties or municipalities affected their appearance would be the appearance of such county or municipality. It could not be that they are comprehended within the term "any person."

The Nebraska decisions left no doubt in the minds of the majority of the judges of the Federal district court in this case. Their opinions are reprinted as an appendix hereto. They found no difficulty under such decisions in holding that the error proceeding was an adequate remedy. It must be kept in mind that their decision was rendered prior to the decision in the Rock Island case, 197 N. W. Rep. 114.

Appellant complains because no supersedeas is provided by the statute. None is necessary. It provides for expedition in the supreme court and if an aggrieved taxpayer desire

he may have a hearing in that court long before the lien for taxes will attach to his property. The hearing before the board is held on the first Monday of July of each year (Section 5901). The supreme court begins its sittings on the third Monday in September of each year (Section 1070). The lien does not attach to the taxpayer's property until November 1 in the year the taxes are assessed (Section 5823) and distress warrants for collection may not issue before February 1 of the succeeding year (Section 6010).

5. THE CASE OF SIOUX CITY BRIDGE CO. VS. DAKOTA COUNTY, 260 U. S. 441, WAS CONSIDERED IN THIS CASE.

That case was decided January 2, 1923. The present case was not decided until January 10, 1923.

On January 10, 1923, the appellant filed the following motion for rehearing (Tran. 47):

> "Comes now the plaintiff in the above entitled cause and most respectfully moves the court, composed of Honorable Robert E. Lewis, Circuit Judge; Honorable Thomas C. Munger, District Judge, and Honorable Joseph W. Woodrough, District Judge, to set aside its order of January 10th, 1923, refusing to grant plaintiff a temporary injunction, and to grant plaintiff a rehearing upon its application for a temporary injunction, and to consider the opinion of the Supreme Court of the United States in the case of *Sioux City Bridge Company* v. *Dakota County, Nebraska*, No. 105, October term, 1922, January 2, 1923, subsequently to the submission of said application.
>
> "Plaintiff shows that the Supreme Court of the United States say in said opinion, that the statutes of the state of Nebraska, considered in the light of the rule of the law declared by the Supreme Court of the state of Nebraska, in the said Sioux City Bridge Company case, and in *Lincoln Telephone & Telegraph Company* v. *Johnson County*, 102 Neb. 254, in all those cases where a complaining taxpayer's property has been assessed at one hundred per cent of its value while

other property in the taxing district in the same year is intentionally and systematically assessed at a much lower percentage, 'deny the injured taxpayer any remedy at all, because it is utterly impossible for him by any judicial proceedings to secure an increase in the assessment of the great mass of over-assessed property in the taxing district * * *. In substance and effect the decision of the Nebraska supreme court in this case upholds the violation of the Fourteenth amendment, to the injury of the bridge company.'

"Plaintiff most respectfully submits that the decision of the Supreme Court of the United States in the said Sioux City Bridge Company case should induce this honorable court to vacate its former order and to grant a rehearing herein, and to hold that plaintiff was without an adequate remedy at law and to issue a temporary injunction, as prayed in plaintiff's bill. Chicago, Burlington & Quincy Railroad Company, by Byron Clark, Jesse L. Root, Solicitors."

On January 11 (filed January 18, 1923,) the court entered the following order (Tran. p. 48):

"This cause coming on to be heard upon the plaintiff's application to vacate the order of this court entered January 10, 1923, refusing to grant plaintiff a temporary injunction, and the court being well advised in the premises,

"It is ordered that said application be and the same is overruled and denied.

"Dated this 11th day of January, A. D. 1923. Robert E. Lewis, Circuit Judge; J. W. Woodrough, District Judge; Thos. C. Munger, District Judge."

The appellees earnestly ask that the decision of the district court be affirmed.

Respectfully submitted,

O. S. SPILLMAN, *Attorney General of Nebraska.*

GEO. W. AYRES, *Asst. Atty. Gen'l of Nebraska.*

HUGH LAMASTER, *Asst. Atty. Gen'l of Nebraska.*

Solicitors for Appellees.

APPENDIX .

Majority opinions in this cause in the United States District Court:

JUDGE LEWIS announced the decision of the Court, as follows:

We think a brief statement coupled with what has already been said in the railroad tax case will sufficiently express the reasons for our conclusions in those cases.

We gave it as our tentative opinion during the progress of the argument that where the state statutes provide a procedure for the settlement of the complaints of a tax payer on account of his contention that his property has been assessed too high, that that procedure should be exhausted under the authorities before resort to a court of equity is had for the purposes of obtaining the extraordinary writ of injunction. We are disposed now to adhere to that tentative view which we held then. Mr. Judson on Taxation in considering this question, Section 623, says:

> "When the question involved is not the validity of the tax in toto, but wholly the amount of the assessment, alleged to be excessive, either on account of overvaluation absolute or relative, or failure to make a required deduction, application must first be made to the revising or equalizing board appointed by the state to hear and act on complaints of excessive or erroneous assessments."

That was done here.

> "In the absence of statute, there is no jurisdiction in the courts to review the discretion of such tribunals, that is, a court of equity is not a court of errors to review their decisions. But the procedure established by the State for the correction of assessments, whatever it is, must be followed, if open to the taxpayer, before he will be allowed to enjoin the alleged excessive assessment. If the state practice allows a judicial review,

of the findings of equalizing boards upon writ of *certiorari* or other statutory procedure, resort must be had to the remedy thus provided."

The reasons for this rule have been many times stated. They are set out at length by the Supreme Court in Pittsburg Railway against the board of Public Works. It is impossible for the assessing and valuation officers to know and fix the amount of revenue for all public purposes, schools, county, and state until valuations are determined so that the rate of levy may be fixed, and it is generally recognized as a principle that that should be done as early and as expeditiously as possible so that public institutions and the state government itself, will not find itself without funds to administer its public functions. Otherwise, if those questions are open the taxpayers, after the amount of taxes required have been ascertained and valuation fixed and the rate of levy made cannot go into a court of equity and enjoin collection of public revenue, and in this case, even to grant what the complaining roads request would leave several hundred thousand dollars of public revenue for the maintenance of schools and county government and state government uncollectible, and force its obligations in the nature of warrants, perhaps to go to discount.

It is for the purpose of avoiding these contingencies and these results which would necessarily follow that the different states have provided for speedy ascertainment and fixing of the valuation and the rate of taxation to be levied. That is thoroughly commented on and set forth in this Pittsburg Railway case. That case arose over the assessment of a bridge. It was a controversy as to whether or not the bridge should have been separately valued and assessed as a structure or building under the statute of the state, or whether, as contended by the railway company it should have been taken in and counted as part of the railway.

Under the statutes of the state the railroad company was given the right to appeal to the State court, the state trial court. It is true that the statute provided that the parties, the board of public works on the one hand and the railway company on the other hand, could both have been heard fully in that court and could have adduced evidence there. They were given that right but the railway company did not avail itself of that right given by the state statute. It stood by and later went into a court of equity and sought a writ of injunction against the collection of the tax on the bridge assessed as a bridge or separate structure. After a full consideration the Supreme Court concluded:

> "The plaintiff, upon its own showing, having made no attempt to avail itself of the adequate remedies provided by the statute of the state for the review of the assessment it complains of, is not entitled to maintain this bill."

A number of authorities are referred to in the case in the 280 Federal, Mo. Pacific Railway Company against Conway and Vilona Road District, which bear out the principles that we are now considering, and which were enforced in that case, one principle being as we understand it, thoroughly established. The only inquiry left in connection with it is whether or not the state provided a remedy for the determination and settlement of the controversy that is presented in this bill. That is to say, that the railway companies' properties were assessed too high in comparison with the valuation of farming lands. The statute was repeatedly read during the argument and commented on. Its language leaves its purpose plain and it cannot be obscure. It provided that if the state board has acted in these questions of assessment and equalization which it has full power to adjust, a writ of error may be sued out to the supreme court, evidently for the purpose of correcting errors, if any, made by the board of equalization.

Similar statutes in this state dealing with county boards of assessment have been passed on by the Supreme Court of Nebraska, and it is held in the Third Nebraska that the county board of equalization when it acts beyond its authority, or unjustly to the tax payer is subject to be reviewed in that respect in the Supreme court, and in that case, *Railway Company* v. *Washington County*, 3 Neb., the audit of the county board was reversed, set aside and vacated. A case of similar nature is *McGee, et al.*, v. *State ex rel. No. Am. Cattle Co.*, 32 Neb. 149. A case treating with the power of the Supreme Court as to the action of the State Board is found in 81 Neb. 139, *State ex rel. Union Pacific Railroad Company* v. *the Board of Equalization.* Now, in that case, construing the statute of this state, the Supreme Court held that this writ of error which the tax payer was entitled to sue out might properly embody such proceedings as we have here, but that the tax payer could have gone before that board and requested of it that it rule on specific questions, as was requested by the Union Pacific Railway that it rule specifically as to the value of the railway property on the basis of stocks and bonds, and that the rule specifically on other questions determining or aiding in the determination of the value of the properties. That request was made before the State Board and the State Board declined specifically to rule on those questions. The railway company then sought a writ of mandamus. Supreme Court reverting to the statutes of this state and calling attention to the fact that the railway company had the right to sue out a writ of error and have the action of the state board corrected. The court then said that if the railroad company wanted to test whether it was the duty of the board to rule upon those specific questions presented to it by the railroad company it could have embodied in its bill of exceptions provided for under the statute the action of the commission in refusing specifically to rule upon those different questions, and could thus have brought the action of the board, in declining to rule upon

those questions, before the supreme court for consideration, and having had that remedy clearly given it under the statute it could not avail itself of the extraordinary remedy of mandamus.

Now, it seems to us this construction of the state statute, not only this statute that was commented on, but other sections of the Nebraska statute with reference to writs of error, must necessarily be a determination and construction by the supreme court of its powers in these tax proceedings to take such action on writ of error to the board as are necessary to correct the very errors complained of now here in a court of equity. Now, that would have been a speedy remedy. The statute says that when such a writ of error is sued out that its consideration shall have precedence in the supreme court. That could have been done. We cannot assume that the state board of equalization would not have followed the opinion of the Supreme Court if it had found that there was an unequal adjustment of taxes on account of farm lands being assessed too low and the railroads too high, as is complained of here. The Supreme Court could not have considered the question that was presented to the board and embodied in the bills of exceptions without announcing its views on the very questions that are presented to this court.

We must assume that the state board of equalization would have abided by the conclusions of the supreme court and have corrected the errors now complained of. If that had been done it would have been in time in the interest of the public to finally determine the question of the rate of taxation and adjust the rate in keeping with the change in valuations if the plaintiffs' contention here is correct, and thus avoid the very thing that the authorities say is intended to be avoided by these provisions for the final determination of these questions. Now, of course, if the Supreme Court had refused to order a modification or any change in the action of the board, the railroad companies,

having thus exhausted all remedies under the revenue statutes for the correction of these claimed errors and it could now show here that it has been unjustly treated in bearing this burden of taxation, it would have then been open to it to come into this court or into a state court of equity to obtain, and would have been entitled on such a showing to the remedy which it now seeks. Not having done so we are of the opinion that it is not entitled to now maintain this procedure, and we hold that a temporary writ should be denied.

Concurring opinion, MUNGER, District Judge:

I concur in the denial of the temporary injunction. If in the processes of making an assessment for taxes an appeal is allowed by the state statute either to the board or to a court which can ascertain and fix the true valuation and assessment, there is such an adequate remedy provided as precludes relief by a suit in the United States Court for an injunction against the enforcement of the assessment unless the appeal provided by the state statute has been pursued.

172 U. S. 32.
188 U. S. 681.
258 U. S. 122.
257 U. S. 547.
232 Fed. 579.
233 Fed. 235.
280 Fed. 401.
240 Fed. 202.

If such an appeal to the State Court is required because it may fix an assessment that is valid, then a proceeding in error, that is provided by the state statute is also an adequate remedy where the court in such error proceedings has the power to set aside the order making an erroneous assessment and to direct the assessing board to reach a different result, because the remedy is as effectual if a valid assessment is made by the assessing board acting

under the directions of the court as if the court had made such an assessment upon the appeal. Under the construction that has been placed upon the statutes of Nebraska of the same general character as the portion of 5901 of the compiled statutes of Nebraska, which provides for an proceeding in error to the supreme court of Nebraska, the supreme court has held that the state courts have the power in error proceedings from the actions of boards exercising powers of this nature to review the actions of such board and vacate and set aside their action.

3 Neb. 30-44.

32 Neb. 149-154.

81 Neb. 139-143-144.